mind were unimpaired; but in the present case no circumstance of either fraud or force was required by the charge of the court to the completion of the offence; nor is it suggested that any such circumstance existed. The naked fact of intercourse, with knowledge of the mental condition, was held sufficient. As one who has knowledge of the facts which prove insanity must be supposed to know that insanity exists, it would follow that in any case of doubt a man's guilt or innocence would depend upon the final judgment of a jury upon the preponderance of testimony on the question of the woman's mental capacity. As marriage with an insane person is void, it might become a serious question whether the ceremony could protect the too partial bridegroom from prosecution for rape, where he had relied upon manifestations which to him appeared the evidences of genius, but which experts should convince a jury were only the vagaries of a disordered imagination.

The conclusion at which we have arrived is, that rape, at the common law or under our statute, is not committed upon the person of a woman over ten years of age, where no circumstance of either force or fraud accompanies the carnal knowledge. The Circuit Court must be advised that in the opinion of this court the conviction was erroneous, and that the verdict should be set aside and a new trial granted.

Supreme Court of New York.

Second District, General Term, February 1866—SCRUGHAM, LOTT, and BARNARD, Js.

NODINE *v.* DOHERTY.

Injury received by horses and carriage through negligence may be recovered, though let by plaintiff to defendant for use declared unlawful by the Sunday Act.

The hire of horses and carriages let on Sunday to be used to ride to a place known as a place of resort for pleasure, cannot be recovered, being let for a purpose made unlawful by statute.

PLAINTIFF let a pair of horses and carriage to defendant on Sunday, defendant saying at the time of hiring that he wanted to take his wife and family to Coney Island; this was all that was said at the time of hiring. The defendant left the horses standing in

the street unhitched, though cautioned not to do so; they ran away, breaking the carriage, &c.

Action was commenced in Justice's Court, plaintiff nonsuited. On appeal to County Court, Kings county, the judgment of the justice of the peace was affirmed by DIKEMAN, J.

Appeal from county judge's decision.

J. G. Schumaker, for plaintiff, appellant.—1. *As to the injury done.* If any person having in charge property of another allows the same to be injured by reason of his negligence, he is equally liable if his want of care was on Sunday as on any other day; and any person who hires of another a horse and carriage on Sunday, is not to be held harmless by the courts if he, by his own fault, allows the carriage to be injured or destroyed. The penalty of doing business on Sunday, which is unlawful, is that which is imposed by statute; the fact of a person doing unlawful business does not permit another to commit a wrong upon him with impunity.

As the doctrine maintained by defendant is unsound in principle, neither is it warranted by precedent. In the case of *Woodman* v. *Hubbard*, 5 Foster 67, in the Superior Court of New Hampshire, the doctrine set forth in the Massachusetts case cited and relied on by defendant is considered and rejected as inequitable and unsound in an elaborate opinion by PERLEY, J., who, after considering the arguments and authorities, says: "It necessarily follows from this view of the case that a man is wholly without remedy for any injury that may be done to the horse he lets on Sunday in violation of the law, if the necessity of showing his illegal contract will preclude his recovery. Though the property is conceded to remain in the plaintiff, he has no remedy to enforce his right, because he cannot show it without showing the illegal contract of letting. And in all the numerous cases where horses are illegally let on Sunday, the hirer might with perfect impunity retain or sell them. This appears to be pushing the application of a well-settled principle to an unnecessary and extravagant length, not required or warranted by the general current of the authorities."

The same question having arisen in *Morton* v. *Gloster*, 46 Me. 520, in the Supreme Court of Maine, the court, citing the previous case of *Bryant* v. *Biddeford*, 39 Me. 193, unanimously sustained the case of *Woodman* v. *Hubbard*, above quoted.

In *Adams* v. *Gay*, 19 Vt. 358, in the Supreme Court of

Vermont, the court held the defendant liable for his fraud in deceiving plaintiff as to the value of a horse exchanged by him, though the transaction was on a Sunday and unlawful under the statute, and said, per REDFIELD, J.: "If the general rule of holding contracts made upon Sunday void, is also to shield the contracting parties from the consequences of their frauds, and to allow the dishonest and abandoned to retain whatever they may be able to get possession of under such contracts, and at the same time release them from all liability upon their own contracts, then the rule itself will be productive of infinite mischief and should be discarded altogether at once. But with such qualifications as the English courts have hinted at, we think the rule a safe one." "In this case the parties in consenting to enter into the contract upon Sunday were equally guilty. The law, therefore, will give neither party any advantage from the contract. But when one party has performed the contract on his part and the other seeks, through his own violation of the statute and desecration of the Lord's day to obtain a benefit without compensation, he becomes the oppressor and the other the oppressed party; and it is on this ground that the court affords this relief or redress."

In *Logan* v. *Mathews*, 6 Barr 417, decided by the Supreme Court of Pennsylvania, it was held—that being an action for damages to a horse and buggy let on Sunday and used by defendant on that day to go on a ride to his father—that the plaintiff should recover therefor, and "that if a bailee for hire return the property in a damaged state, the burden of proof to show there was no negligence in its use is upon him."

In *Harrison* v. *Marshall*, 4 E. D. Smith 271, New York Common Pleas, an action for injuries to a horse by negligence of defendant—the horse being let on Sunday—INGRAHAM, J., delivering the opinion of the court, says: "It is objected that the hiring having been made for Sunday was unlawful, and therefore the plaintiff could not recover. The action, however, is not for the proceeds of the hiring, but for damages for a wrong done, and for such wrong I suppose the plaintiffs may recover, although they could not recover the price agreed to be paid for the hiring."

See, also, *Sargent* v. *Butts*, 21 Vt. 99; *Banks* v. *Werts*, 13 Ind. 205; *Boynton* v. *Page*, 13 Wend. 425; *Story* v. *Elliott*, 8 Cowen 27; *Mohney* v. *Cook*, 26 Penna. (2 Casey) 342; *Commonwealth* v. *Nesbitt*, 34 Ibid. (10 Casey) 398; *Flagg* v. *Millbury*,

4 Cush. 243; *Myers* v. *State*, 1 Conn. 502; *Etchberry* v. *Seville*, 2 Hilton N. C. P. 40; *Bloxsome* v. *Williams*, 3 B. & C. 232 (10 E. C. L. R.); *Williams* v. *Paul*, 6 Bingh. 653 (19 E. C. L. R.).

Parsons, in his Treatise on Contracts, p. 262, f, 4th ed., after stating the case: "If A. makes a contract with B., prohibited by the Sunday Law, and therefore void, and B., by means which this bargain gives him, and by an abuse of the bargain on his part, commits a wrong against A., is A. barred by his illegal contract from getting redress for the wrong?" and citing the Massachusetts and New Hampshire cases above referred to, says: "*Upon the whole we incline to the view held in New Hampshire.*"

2. *As to the Hire.*—The person hiring a carriage on Sunday is the party to be charged with knowledge of the use which he intends to make of the same.

1st. The use of the horses and carriage is lawful or unlawful, according to the intent in the mind of the person using them. If he rides for his health, for charitable or necessary purposes, it is lawful. If for his pleasure merely, unlawful. If the contrary be not shown the presumption always is, that a man acts for a lawful purpose. A livery stable keeper is not bound to presume, when requested for a horse and carriage on Sunday, that the person asking therefor wishes it for an unlawful purpose.

2d. And the *onus probandi* is upon the defendant to show that the plaintiff did know that he hired the carriage for an unlawful purpose, if such was the fact, which is not shown in the proof.

3d. If the defendant hired the carriage for pleasure driving, he was and is guilty of a misdemeanor, and the defendant could not presume the intent of the defendant to be *criminal*, unless there was no other reasonable conclusion.

4th. And particularly in the case of the unconscionable plea of the defendant, that he should not fulfil his express and implied agreements, because the day on which he made them was Sunday, he should be held strictly to his proof; an unconscionable plea is not to be favored by the court, and the party pleading it will not be assisted by presumptions or conclusions, but must make his case clear.

3. *The plaintiff's claim cannot be defeated unless he was in pari delicto with defendant.*—The prohibition of the statute is not against letting horses, but against travelling for other purposes than those therein specified, while it makes the act of the defend-

ant criminal, and imposes a penalty upon him for committing it, imposes none on the plaintiff.

SELDEN, J., delivering the opinion of the Court of Appeals, in Schermerhorn *v.* Talman, says that the plaintiff may recover though *particeps criminis* when not *in pari delicto*, and that "the test adopted by Lord MANSFIELD and Mr. Justice BLACKSTONE, by which to determine the relative guilt of the parties, viz., 'to see upon which party the penalty is imposed, would seem to be just.'" "I am very firmly persuaded that the doctrine is sound, and the distinction upon which it rests, one which exists in principle and in reason. It applies no less in equity than at law, its foundation being that the parties, although joint participators in an illegal transaction, are not equally criminal:" 4 Kern. 94, 123.

"Mere knowledge by the vendor that the purchaser intends to make an illegal use of the property is not a defence to an action for its price."

In the Court of Appeals, *Tracy* v. *Talmage*, President, &c., the court, per SELDEN, J., held that "It is no defence to an action brought to recover the price of goods sold that the vendor *knew* that they were bought for an illegal purpose, provided it is not made *a part of the contract* that they *shall be used* for that purpose; and provided also that the vendor has done nothing in aid or furtherance of the unlawful design" beyond the mere sale, with knowledge of the illegal intent of the purchaser: 4 Kern. 162, 176, 210.

Reaffirmed: *Curtis* v. *Leavitt*, 1 Smith (15 N. Y.). See last paragraph of head notes, p. 182.

The same principle applies of course to property *let*.

Henry McCloskey, for defendant.—1. The statute prohibits all travel on Sunday, unless in cases of charity or necessity; or in going to or returning from some church or place of worship within the distance of twenty miles; or in going for medical aid or medicines; or in visiting the sick or carrying the mails; or in going express by order of some public officer; or in removing a family or furniture when the removal was commenced on some other day: 1 Revised Statutes 675, § 70, Edmunds 628.

The plaintiff, in letting the horses and vehicle for a pleasure-drive on Sunday, committed an unlawful act, and hired out his property knowingly to be used in violating a law of the state. He

cannot, therefore, invoke the aid of the law to relieve him from any injurious consequences arising from his own illegal act.

"If from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of his country, then the courts say he has no right to be assisted:" *DeGroot* v. *Van Duyser*, 20 Wend. 390.

2. The owner of property who hires it knowingly to be used for an illegal purpose cannot maintain an action to recover its value, if destroyed or damaged, for injury done to it.

"If a trader agrees to furnish a robber with arms and ammunition, for the purpose of carrying on his business as a highwayman, * * * * no action or claim can be sustained in a court of justice founded on such a contract:" *DeGroot* v. *Van Duyser*, *supra*.

Furnishing a team to be driven to Coney Island on Sunday, is as positive a violation of a statute of the state, as it would be to furnish fire-arms in the instance above cited by the court. If the arms in the latter case should be injured or destroyed by the highwayman using them, could the owner who hired them for such a purpose recover their value? If not, then the owner of a team hired for Sunday pleasure-travelling could not recover if the whole establishment should be destroyed. See also *Gregg* v. *Wyman*, 4 Cushing 322.

3. No person can maintain an action founded on an unlawful proceeding, and it cannot be maintained where the plaintiff in making out his case is obliged to prove an illegal act as a link in the chain of evidence.

"The test," says Chitty, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case:" Chitty on Contracts, Hartford edition, 1839, p. 513.

It was only in consequence of the contract of hiring that the respondent came to have possession of the horses and carriage, and that he was under an implied obligation to bestow reasonable care upon them. Strike out the contract of hiring and the plaintiff cannot establish his case.

"Courts of justice are not required in any way to aid the enforcement of an illegal contract, or lend their assistance in any respect to an illegal transaction:" *Rose* v. *Trax*, 24 Barb. 361. "No claim founded on an illegal transaction, whether it be

malum prohibitum or *malum in se*, can be enforced by action. * * * * * Every act done against a prohibitory statute is not only illegal and absolutely void, but the court cannot assist an illegal transaction in any respect or permit it to be set up as a protection:" *Barton* v. *The Port Jackson Plank Road Co.*, 17 Barb. 397.

The opinion of the court was delivered by

LOTT, J.—The defendant hired of the plaintiff a pair of horses, wagon, and harness, on Sunday, 23d day of June 1864, for the purpose of taking a ride to Coney Island, known as a place of resort for pleasure, and while they were in his possession the horses ran away in consequence, as it is alleged by the plaintiff, of the negligence by the defendant in suffering them to stand in the street without being tied, after being cautioned that it was unsafe to do so, and the wagon and the harness sustained damage to a considerable extent. This action is brought to recover the compensation for the use of the property and the damage done thereto. The plaintiff was nonsuited on the ground that the contract for the hiring was void.

Travelling on Sundays, except for special purposes and in specified cases, is prohibited by the statute, and the contract for the hiring of the property having been made with the knowledge by the plaintiff that it was to be used for that purpose, was illegal, and the plaintiff was not entitled to recover any compensation for the use of the property hired.

The defendant, however, could not, after obtaining possession of the property, wilfully injure it or suffer it to be injured through his negligence. Such conduct has no necessary or legitimate connection with the contract of hiring. The owner does not forfeit or become divested of his right to the property by its delivery under it. He has a right to the return of it, and if it is retained after demand an action could be maintained for the recovery thereof or its value, and there is no reason or principle why he should not as well be compensated for its deterioration or any damage to it by reason of the fault of the party to whom it was hired. Such liability does not arise from the contract, but from a breach of duty in violation of the plaintiff's rights wholly irrespective of the contract. We are therefore of opinion that the plaintiff was improperly nonsuited, and the judgment in the court below must be reversed with costs.